Supreme Court, U.S.
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No. 99-1496

IN THE
SUPREME COURT OF THE UNITED STATES

GIA KALYNA JANAKAKIS-KOSTUN
Petitioner,

v.

EMMANUEL JANAKAKIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Background

Emmanuel Janakakis is a Captain in the Greek Navy who graduated from the Naval Academy in Athens. During 1986 to 1988 he participated in a personnel exchange program with the United States Navy at the San Diego Naval Base where he met Gia Kostun. Upon his return, Gia followed him to Greece where they were married in Glyfada on September 2, 1989. They lived together in Greece thereafter, and Bronte was born in Chania on October 7, 1991. (Tape 1; 10:09:44-10:09:55).

Bronte attended kindergarten in Kounoupidiana Crete, Greece (Tape 1; 10:20:38) and preschool at the Souda Naval Base on Crete from September, 1995 to January, 1996. (Tape 1; 10:49:43; Trial Exhibit 3-2). While at the Souda Naval Base Bronte learned Greek and began speaking Greek with her Father. (Tape 1; 10:59:55, Tape 1; 14:59:35-15:01:50). Although Emmanuel lived with Gia and Bronte in military housing at the Souda Naval Base he was building homes on land he owned in Athens and Crete. (Tape 1; 14:30:20-14:31:22).

During 1995, Gia began making threats to leave Greece with Bronte telling Emmanuel he would never see Bronte's big brown eyes again. (Tape 1; 10:13:40-14:00). In the fall of 1995, Gia told Emmanuel that she was going to visit her mother in Houston, Texas during Christmas and take Bronte with her. Emmanuel replied that she could go but Bronte stayed with him at home during Christmas and that he would exercise his rights as a father to prevent Bronte from going. Gia responded that she was the mother, could do anything she wanted, and didn't care what a stupid judge

would say. (Tape 1; 10:26:20-10:27:50). In a letter to Gia's Mother in Houston, Texas, Emmanuel expressed his position regarding Bronte's staying at home during Christmas, his desire to have Bronte with him, and his fear that Gia would not return to Greece with Bronte. (Trial Exhibit 2-T; Tape 1; 10:30:22-10:34:00).

Gia was not to be denied. In January of 1996 Emmanuel received word that Bronte would be suspended from the Souda Naval Base preschool because of Gia's behavior. Emmanuel was able to persuade the teacher not to take this action, but Gia refused to let Bronte return to school. (Tape 1; 10:11:03). Previously, when Bronte attended kindergarten at Kounoupidiana, she had told Emmanuel the school bus driver had raped Bronte and the school practiced witchcraft. Emmanuel investigated the claim but found it had no foundation, although Gia testified she took Bronte to Dr. Matsuma, the child's pediatrician for an examination to determine if there had been sexual abuse and molestation. Dr. Matsuma denied that she had conducted any such examination. (Trial Record Volume II, p. 174).

On Saturday, February 24, 1996, Gia announced to Emmanuel she was taking Bronte to the States and would not be coming back. Emmanuel reported this to police but they possessed no authority to stop her. Later that day Emmanuel confronted Gia as she was leaving with Bronte and tore up Bronte's passport to prevent the child from leaving. Gia hailed a car going to the airport and from there flew to Athens. (Tape 1; 11:11:20-11:15:54).

Emmanuel called his mother in Athens and asked her to go to the airport to determine if Gia was going to attempt to leave. He called his attorney and with his help and advice prepared the paperwork for an order of temporary care of

Bronte and a criminal complaint against Gia for abduction. Emmanuel then flew to Athens. (Tape 1; 11:01:25-11:20:52). February 26, 1996 was a Greek holiday, and Gia was unable to obtain a replacement passport for Bronte at the American Embassy. On the following day, Emmanuel obtained a temporary custody order from an Athens Court and a "Security Measure" that Bronte could not be removed from Greece until further orders of Court. (Trial Exhibit B) (Tape 1; 11:44:10-11:48:09). Emmanuel, following the advice of his attorney, had Gia's name entered in the central computer of the Department of National Security and prevented Bronte from exiting Greece. (Tape 1; 11:01:25-11:23:25).

On that same day, Gia obtained a replacement passport for Bronte and attempted to leave Greece but was arrested at the Athens Airport. Later that day, Emmanuel was able to rescue Bronte and prevent her from leaving. The next day after a night in jail a Greek judge dismissed charges of abduction against Gia without objection by Emmanuel. (Tape 1; 11:23:25-11:28:15).

The custody battle for Bronte continued in the Single Member Lower Court of Chania on Crete. Emmanuel filed a petition on March 8, 1996 to remove Gia from the marital home and Gia filed a petition on May 2, 1996 for temporary care of Bronte and alimony. On June 28, 1996, pursuant to Decision No. 53-1996, Judge Zambola gave Gia temporary care of Bronte noting that the order of a lower court of Athens prohibiting Bronte's exit from Greece continued. Judge Zambola stated:

> Besides those, the defendant-petitioner (wife) cannot anymore after the above decision of the Single Member Lower Court of Athens depart along with a minor child from Greece, and has

> rented a residence in Chania and sought employment with the American Navy Force (Naval Base Souda), in order that the petitioner/defendant (husband) not be deprived of his communication (visitations) with the minor. (Tape 3; 13:37:40-14:06:00) (Trial Exhibit 16-P) (Resp. App.5a).

By order of the Single Member Lower Court of Chania on 22 July, 1996, Emmanuel received visitation with Bronte on the second and fourth weekend of every month, the first and third Wednesday of every month, Christmas holidays, January holidays, and a whole month of every year in July or August. (Trial Exhibit A) (Tape 1; 13:39:50-39:40:52) (Tape 1; 11:44:10).

Gia, through her attorney, on June 12, 1996, filed an action in the Lower Court of Chania to obtain permanent custody of Bronte seeking permission to leave Greece with Bronte to live in Seabrook, Texas. (Tape 3; 14:45:15) (Trial Exhibit 17-P). The Petition was set for trial September 5, 1996 but Gia failed to appear for the court appearance. The Chania Court continued the case until later that month and then continued it again until January 17, 1997. Gia's attorney appeared on the 5th of September, but Gia did not appear for any of the court appearances. (Tape 1; 13:26:00).

Gia's failure to appear for court confirmed in Emmanuel's mind that she had abducted Bronte from Greece. Earlier in July, Emmanuel had tried to exercise his rights to visitation by going to her apartment on two occasions without success. When Gia failed to appear in court in September, Emmanuel went to the Greek Central Authority to start proceedings for a return of Bronte under the Hague Child Abduction Convention. After obtaining court documents and

translations, Emmanuel signed on November 14, 1996 the Petition for her return. (Tape 1; 13:41:48-13:47:00) (Trial Exhibit 5-P).

During the trial Gia testified as to only two instances of any physicality by Emmanuel toward Bronte. She claimed Emmanuel pushed her down with Bronte in her arms on February 24, 1996 and during the period in which the three of them were living in the same household after the Athens Court order. (Tape 3; 16:46:10-16:47:51) (Tape 3; 11:50:57-11:51:01). Nowhere in the testimony of Gia during the trial did she testify that Emmanuel had abused her except for the two instances above. At no time in the proceedings did the trial judge prohibit Gia from testifying as to any acts of abuse or brutality towards her.

After the conclusion of the trial at the Circuit Court level and the entry of the judgment by the trial court, Gia in a motion for a new trial offered a translation of a decision by Judge Styliani Zombola of the Lower Court of Chania which purported to contain findings of fact that Emmanuel was a violent, authoritarian person who had hit Bronte and abused Gia. To rebut the translation, Emmanuel offered an explanation of the decision by A. Eleftheriadou, Head of the Greek Central Authority, who explained the decision was a temporary security measure based on "conjecture" "(guess)," which carried no evidentiary value in the "main case." (Resp. App. 10a). Emmanuel also filed a correct translation of Judge Zambola's order (Resp. App. A).

At trial, Gia offered the testimony of Dr. Winsch, a psychologist hired by her after service of Emmanuel's complaint in Hardin County, Kentucky. Winsch testified Gia hired him to make a general evaluation of Bronte for treatment, not to formulate an opinion for custody placement.

(Tape 3; 9:10:00). According to Winsch, custody opinions required more substantiation than treatment evaluations, in particular they required an interview with the father. (Tape 3; 11:40). Winsch made a diagnosis of post-traumatic stress disorder, and, without ever interviewing Emmanuel, made an additional diagnosis or gave an opinion that Bronte's condition was caused by probable sexual, physical and emotional abuse and neglect. (Tape 3; 9:40:00) (Tape 3; 10:41:27).

On cross examination Winsch admitted that without corroboration Gia's history of what had occurred in Bronte's life was taken with a grain of salt. (Tape 3; 10:29:05). He testified he made no effort to interview Emmanuel although he recognized that forensic testimony and opinion, as codified in Rule 7.02 of the Ethical Principles of Psychologists, required more substantiation than treatment decisions. (Tape 3; 10:44:00-10:46:00). He admitted his psychological testing of Bronte showed no signs of sexual abuse and his opinion, that sex abuse caused Bronte's emotional condition, rested solely on Gia's statements to him. (Tape 3; 11:24:25-11:25:20). He admitted on cross examination that the remainder of his opinion on causation, that physical abuse and neglect caused Bronte's emotional condition, was based entirely upon what Gia told him. (Tape 3; 10:50:10-10:50:40). Winsch stated that without Gia's history he would have no explanation of what events caused the emotional problems he found in Bronte. (Tape 3; 10:50:10-10:50:40). Winsch stated his testimony pertaining to Bronte carried much less weight than testimony offered in a forensic setting buttressed by substantiation of which an interview with the father would be crucial. (Tape 3; 10:45:08-10:46:00).

Winsch testified on cross examination that Gia had not informed him of the tearful and emotional separation of July

1, 1996 when Bronte was taken from Emmanuel and given to Gia for temporary care, and he was not advised of the events occurring during the abduction of Bronte from Greece. (Tape 3; 10:29:10-10:47:46-10:48:19). Winsch testified that Gia could have induced Bronte's alleged fears of Greece and of Greek men and that taking a child from a parent with whom the child had bonded, in this instance Emmanuel, could be traumatic, possibly causing serious psychological harm. (Tape 3; 10:46:00) (10:31:10-10:31:26; 10:32:20).

Allegations by Gia at trial that Bronte had scabies, pinworms and nightmares, was reduced to skin and bones and was afraid of Greek men (as told by Gia to Dr. Winsch), were dramatically rebutted by Emmanuel. Dr. Matsuma, Bronte's pediatrician, testified she had never treated Bronte for emotional problems. (Record on Appeal Vol. II, p. 197). Emmanuel offered medical records with Matsuma's entries which showed that Bronte had gained 6.6 pounds from August 31, 1995 to June 6, 1996 and had increased in height during that period. A June 6, 1996 medical examination found Bronte in good health with no problems. (Tape 1; 13:56:51-14:06:36) (Trial Exhibit 6-P). Emmanuel also introduced photographs of Bronte taken June 30, 1996, the date before her transfer to the temporary care of Gia as ordered by the Chania Court, which depicted her as a healthy child. (Trial Exhibits 9-P and 10-P) (Tape 3; 14:36:34-14:37:00). Dr. Winsch observed the photographs and stated that Bronte appeared "pretty similar to how she looks at this point." (Tape 3; 10:37:25-10:37:46). Emmanuel further testified that Bronte was never put in a cage, never had nightmares, regular vomiting, scabies, open sores, never was afraid of people from Greece, and was never punished physically by him except for a smack on the back. (Tape 1; 14:22:38) (Tape 1: 14:56:15-14:59:16) (Tape 1; 15:01:56-15:04:38). All of Gia's witnesses who testified that she had nightmares, scabies,

etc. and was afraid of people from Greece came from her relatives who observed her and viewed her after the harrowing abduction through the Balkans, which George Kostun, Gia's father, said left Bronte "half dead". (Tape 2; 10:07:40).

Misstatements of Fact

The following are Petitioner's misstatements of fact that bear on the issues of law which would be before the Court if certiorari were granted.

1. The representations that Gia made plans to leave Greece with Bronte, Mr. Kostun, her father, assisted them, and they lived in Kentucky upon their arrival to the United States is an enormous understatement. (Pet. p.4). In fact, as the trial court found, the Greek courts prohibited Gia from removing Bronte from Greece pending a final custody order, but Gia and Mr. Kostun, a former Green Beret and probable CIA agent, smuggled Bronte out of Greece in a "harrowing journey" through the Balkans "living here, there and everywhere depriving Bronte of contact with her father". (Pet. App. 32a)

2. To represent to the Court that Emmanuel filed for and received custody of Bronte in Gia's absence misleads the Court. (Pet. p.4). In fact Gia filed a divorce action in June of 1996 with the Lower Court of Chania to gain permanent custody of Bronte and to seek the Court's permission to live in Seabrook, Texas. Gia's action was scheduled to be heard September 5, 1996, at which time Emmanuel appeared and Gia's attorney appeared, but Gia was nowhere to be found. Emmanuel filed a similar action seeking permanent custody when Gia failed to appear, so

Gia's case, as well as Emmanuel's, was postponed until January 16, 1997. On January 16, 1997, Gia again failed to appear and her action was dismissed. Emmanuel proceeded with his action and the Lower Court of Chania granted him permanent custody. (See Resp. App. 12a).

3. Gia represents to this Court she presented evidence at trial that Emmanuel abused Bronte while she and Bronte lived with him. (Pet. p.5) This is a misrepresentation of the record. The trial court specifically found as follows: "There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel. . . ." (Pet. App. 34a). The trial record is devoid of such evidence.

4. Dr. Winsch, a child psychologist, who examined Bronte on several occasions, did not find signs of physical or sexual abuse as represented here by Gia, (Pet. p.5) although he did find signs of traumatic stress disorder. The trial court specifically found that the sole basis for Dr. Winsch's diagnosis of probable sexual, physical and emotional abuse was the statements made to him by Gia. No sexual problems appeared in the testing that Dr. Winsch performed, neither did Dr. Winsch observe any sexual acting out by Bronte. The lack of sexual acting out is confirmed by the testimony of four school employees, and each testified they had not seen any sexual acting out by Bronte at school. The trial court characterized Dr. Winsch's diagnosis, which was based solely on the self-serving statements of Gia, as no diagnosis at all. The trial court further found that if Bronte was suffering from traumatic stress disorder the evidence offers no explanation for why Bronte might be suffering from this problem, and there was absolutely no competent evidence before the Court that Emmanuel was responsible for Bronte's current psychological condition. The Court further found that the only extended period of stress to which Bronte had been

subjected was the "surreptitious and harrowing removal of Bronte from Greece by Gia, and the vagabond journey to which Bronte had been subjected thereafter . . ." (Pet. App. 32a).

5. Petitioner represents to the Court that Emmanuel physically abused Gia on numerous occasions including an incident which required Gia's hospitalization. (Pet. p.5). This is an exaggeration of the record. Gia's testimony of physical abuse of her by Emmanuel is minimal. The Court of Appeals of Kentucky listed the incidents of alleged physical abuse. The Court pointed out on one occasion Gia alleged Emmanuel went into a violent rage, destroyed items in the house and pushed Gia and Bronte to the floor. Emmanuel denied this and testified he was upset when Gia allowed Bronte to get into a locked storage room where he kept his hunting guns. In his haste to get his daughter out of the room and away from the guns, a table tipped over. The Court of Appeals mentioned an occasion, alleged by Gia, when Emmanuel pulled Gia's hair so violently during a quarrel she was hospitalized with severe neck injuries. This incident occurred during the summer of 1993, three years before the abduction. Emmanuel admitted he pulled Gia's hair but testified that it was she who claimed a injury necessitated her hospitalization. There was no medical evidence to substantiate any injury causing hospitalization, and Gia did not mention this three year-old incident in her trial testimony.

6. It is a misstatement of the record before this Court that several of the custody proceedings in Greece were conducted entirely in Greek, and Gia, who does not speak Greek, did not have a court-appointed interpreter. (Pet. p. 5). At trial and on appeal, Gia has constantly argued she was without the aid of an interpreter during the Court proceedings

in Athens, which resulted in an order giving Emmanuel temporary custody and ordered Gia not to remove Bronte from Greece pending a final resolution of the custody issue. However, the record of proceedings of the Lower Court of Athens of March 28, 1996, related the appointment of Nikolaos Stamatopoulos as Gia's interpreter. (Resp. App. 15a). The only other hearing before a Greek Court was before the Lower Court of Chania convened May 23, 1996, which resulted in a change of temporary custody from Emmanuel to Gia. The third scheduled hearing occurred before the Lower Court of Chania but did not result in the taking of testimony. By agreement between Gia and Emmanuel, Emmanuel was granted liberal rights of visitation. (Resp. App. 11a). For Gia to allege here that she was prejudiced by not having a Court appointed interpreter is in the first instance untrue and in the second and third instances disingenuous. In the Greek litigation, Gia was successfully represented by several Greek attorneys, one of whom was hired through the U.S. Embassy. (Tape 1; 11:35:35). At the March 28, 1996 Athen's hearing on "Security Measures" to prevent Bronte from leaving Greece, Gia appeared with her attorney Kyriakos Kokkinos. At the hearing in the Lower Court of Chania on 23, May, 1996, when temporary custody was transferred to Gia, Christina Pateraki, attorney at law, represented her. At Emmanuel's July 4, 1996 petition for visitation before the Lower Court of Chania, attorney Helen Kokkinaki represented Gia. (Tape 1; 11:44:10). At the September 5, 1996 trial date, Gia's attorney appeared on her behalf and, in fact, had given Emmanuel notice of the hearing. (Tape 1; 41:48:00).

7. The Petitioner misrepresents the record by stating the trial court and the Court of Appeals on *de novo* review found certain facts pertaining to abuse were established by Gia (List of incidents omitted) (Pet. p. 6).

Neither the trial court nor the Court of Appeals found that Gia established any incidents of abuse toward Bronte or Gia. The Court of Appeals very carefully stated, "Gia alleges that, at trial, she established that Bronte would face an 'intolerable situation' if returned to Greece. In support of this position, Gia cites several examples of violent behavior by Emmanuel toward herself and Bronte." (list of incidents omitted) (Pet. App. 11a). The trial court found specifically that Emmanuel had not abused Bronte and made no written finding that he had abused Gia.

8. The Petitioner misrepresents the record by stating the Court of Appeals failed to consider the Chania Order and the Greek court's finding that Mr. Janakakis was abusive towards Bronte and Gia. First of all, the Greek court did not make a finding that Emmanuel was abusive toward Bronte and Gia as is amply demonstrated in the translation offered (Resp. App. 3a-3b), and the explanation of the Order by the Greek Central Authority. (Resp. App.10a). The Kentucky Court of Appeals discusses the Chania Order of June 28, 1996 as recounting "accusations of violence by Emmanuel toward [Gia] and Bronte". One must remember that the "conjecture" in the Chania Order was not part of Gia's testimony at trial and was belatedly offered by her in an effort to secure a new trial on the merits. The Kentucky courts had before them a correct translation of the Chania Order which demonstrated that the Greek judge did not make a finding of fact that Emmanuel had abused Bronte and Gia, rather the Order clearly stated that there was "conjecture (guess)" that Emmanuel was violent and authoritarian. The Greek Central Authority explained that the "decision of Security Measures is temporary and does not effect the main case (Article 695), the main case referring to the final custody decision." (Resp. App.10a). The Petitioner will remember that during arguments before the Kentucky Court of Appeals

Judge Wilfred Shroeder commented that the Greek "Security Measures" procedure was similar to the procedure in Kentucky for obtaining an Emergency Protective Order which is temporary and can be based on the mere affidavit of an accusing spouse.

9. Finally, a careful review of the trial proceedings and the record reveals it was Gia who raised the issue of the competency and willingness of the Greek courts to protect Bronte and her. Gia introduced evidence, her unsubstantiated testimony, about the failure of the Greek courts to provide interpreters and claims of Emmanuel's great influence with the government. Gia claimed she faced unfairness and danger if she stayed in Greece or returned there. (Pet. App. 35a, 16a). That was the substance of her case at trial, not Emmanuel's alleged abuse, allegations that arose after the trial. When the trial court wrote that there is absolutely no competent evidence before the court that ". . . Bronte faces certain danger in Greece", the court was responding to Gia's allegations; not redefining Article 13b. (Tape3; 10:03:97; 11:45:29) (Tape 2; 10:02:97; 16:52:56; 16:56:50) Tape 2; 10:02:97; 17:04:25) (Tape 3; 10:03:97; 11:36:39; 11:54:30; 12:15:37).

10. Petitioner stated that Gia presented to the court evidence regarding the leniency of Greek courts towards domestic violence. (Pet. p. 17). That is not a true statement. There was no evidence before the trial court regarding such leniency. In the Petitioner's Brief before the Kentucky Court of Appeals there is a gratuitous insertion of a U.S. Department of State Report on that issue, but that is not competent evidence. Likewise, the June 24, 1997 Order of the Lower Court of Chania (Resp. App. A) is not competent evidence. It was filed of record to support a motion for a new trial, but never offered as evidence at the trial level.

Misstatement of Law

11. The Petitioner seems to assume throughout her argument and statement of the facts that the Kentucky Court of Appeals is a fact finding body which reviews the evidence, not just the law, *de novo*. The Kentucky Court of Appeals reviews the trial court's findings of fact to determine if they were clearly erroneous and gives due regard to the opportunity of the trial court to judge the credibility of the witnesses. (Ky. R. Civ. Proc. (CR) 52.01). The Kentucky Court of Appeals is not permitted to conduct a *de novo* review of the facts and substitute its judgment for the trial courts. (Pet. App. 16a).

ARGUMENT

The Kentucky trial court's finding of fact confirmed by the Kentucky Court of Appeals, that Emmanuel had not physically or psychologically abused Bronte and that she faced no risk of harm by returning to Greece, makes this case inappropriate to challenge the 13(b). analysis of *Friedrich v. Friedrich*, 78 F.3d 1060 (6th Cir. 1966). An analysis of the Janakakis facts using *Friedrich* is a two step process only if, first, the court finds serious abuse or neglect or extraordinary emotional dependence." If serious abuse and neglect are found the court must, second, determine if the courts of the child's habitual residence are able to protect the child. 78 F.3d at 1069. Although the Kentucky courts cited *Friedrich* and analyzed the facts of the Janakakis case in light of *Friedrich*, the analysis was not carried to the final issue, i.e. [w]ere the Greek Courts competent and willing to protect Bronte? Bronte fortunately did not need to be protected by Emmanuel as there was no abuse on his part.

Gia's questions for review to the Court are premised upon misstatements of fact from the Record and a faulty assumption regarding the Kentucky courts' application of *Friedrich* to the facts in *Janakakis*. The first question, "[d]oes the 'grave risk' exception require a court to exclude evidence of alleged 'physical or psychological harm' (including admitted evidence of violence in the home), if such harm does not include evidence of direct physical abuse of the child?", makes no sense in the context of a trial where the trial court did not exclude evidence of physical or psychological harm. The Kentucky trial judge considered the evidence but found it lacking in credibility and probative value. (Pet. App. C). The trial court did not exclude any proffered evidence of spouse abuse; Gia just did not offer much.

The second question, "[b]efore a trial court may deny a petition for return of the child under the 'grave risk' exception, the court is also required to find that the country of habitual residence is unable to provide the child with adequate protection, when that requirement is not found in the plain language of Article 13(b)?", makes no sense in the context of a trial and appellate court decision which found that the requesting father did not cause psychological and physical harm to the child and, if there was harm, it was likely caused by the mother. Who knows what the Court would have done if Bronte had faced a "grave risk" of harm from Emmanuel. That issue was not explored by the trial court because, obviously, Emmanuel presented no risk to Bronte. The trial court merely restated the *Friedrich* analysis, but it was unnecessary to do so. (Petitioner App. 33a).

For the same reasons the assertion that the Kentucky Court of Appeals has diverged from *Friedrich* by requiring "certain harm" rather than "grave risk of harm" is nonsense.

The trial court not the appellate court used the phrase "certain danger", perhaps as a response to Gia's claim she could get no protection from the Greek courts, but it was merely a literary description and not the creation of a new legal standard for Article 13(b). (Pet. App. 34a). After a full and fair reading of the trial judge's opinion, a fair-minded person could not reach a contrary conclusion. The trial court found: "There is absolutely no competent evidence before the Court that Bronte has been abused or neglected by Emmanuel or that Bronte faces certain danger in Greece. (Pet. App. 34a). The decision of the Kentucky Court of Appeals does not repeat the phrase when it adopted the trial court's analysis and does not make "certain harm" or "certain danger" part of the 13(b). exception.

It is certainly misleading to argue, as does the Petitioner, that the Kentucky Court of Appeals required Gia to prove that the courts in Greece were incapable or unwilling to give Bronte adequate protection. Reading both decisions, the trial court's and the appellate court's, in their entirety leads any reasonable person to conclude that the courts were merely restating the entire *Friedrich* analysis. The Kentucky courts could have properly ended the analysis after concluding that Bronte faced no harm from her father. In fact the Kentucky courts could have cited just as easily *Blondin v. Dubois*, 189 F.3d 240 (2nd Cir 1999) or *Steffen v. Severina*, 966 F. Supp. 922, cases which the Petitioner arraigns against *Friedrich* to present a conflict of authority. In *Blondin* the circuit court recognized that the district court had concluded the child sought to be returned actually faced a "grave risk of harm" from returning to France, her place of habitual residence, but remanded the case to the district court to fashion a return order that would protect the child from the father. The court noted this would preserve the objectives and spirit of the Convention. *Blondin*, 189 F.3d at 248. In

Steffen v. Severina, 966 F. Supp. at 927, the district court, citing *Rydder v. Rydder*, 49 F.3d 369, 373 (8th Cir. 1995), rejected the *Friedrich* analysis, but this was a case in which the court determined the child sought to be returned would face a "grave risk of harm" in being separated from the mother. In contrast the Kentucky trial court found that any emotional or psychological harm to Bronte more likely came from the mother. As the trial court noted, "[t]he only extended period of stress to which Bronte has been subjected that has been proved by the evidence is the surreptitious and harrowing removal of Bronte from Greece by Gia, and the vagabond journey to which Bronte has been subjected thereafter, living here, there, and everywhere, and being deprived of all contact with her father." (Pet. App. 32a).

If the court uses this case to review *Friedrich*, it will have to review do novo the findings of the trial court and conclude Emmanuel presented a "grave risk of harm" as defined by Article 13(b) or revisit the Kentucky Court of Appeal decision that the trial court's findings of fact were not clearly erroneous.

CONCLUSION

The relief the Respondent seeks is for this Court not to grant certiorari, but to leave intact the findings of the trial court judge and the decision of the Kentucky Court of Appeals. This case is not an appropriate vehicle by which to challenge the 6th Circuit's Decision in *Friedrich*.

Respectfully submitted,

/s/_____

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APPENDIX A

EXACT TRANSLATION OF-
THE ATTACHED DOCUMENT
FROM GREEK TO ENGLISH
CHANIA 30-3-1998
THE TRANSLATOR
PROKOPIOS VARDOULAKIS
ATTORNEY AT LAW

Decision Number 531/1996

The

SINGLE MEMBER LOWER COURT OF CHANIA

Consisting of Styliani Zombola, President of Lower Court Judges and Evgenia Kapetanaki, Secretary

Met in public hearing on the 23rd May 1996 to judge the case between:

THE PETITIONER - DEFENDANT (husband) Emmanuel Tzanakakis, son of Konstantinos, commander of the Navy, resident of Souda, who was present with his attorney at law Christina Pateraki, legalizing Vasilis Panagiotopoulos, lawyer of Athens.

THE DEFENDANT - PETITIONER (wife): Gia, wife of Emm. Tzanakakis, nee Kostun, resident of Souda, who was present with her attorney at law Eleni Kokkinaki, legalizing Kyriakos Kokkinos, lawyer of Athens.

Translation of Decision No. 531/1996

The petitioner-defendant (wife) requests that her petition, ref. No /May 2nd 1996, be accepted and the defendant-petitioner (husband) requests that his petition be accepted and they were signed for the date referred to above. During the hearing of the case the attorneys at law of the parties set forth their claims and requested that their please be accepted.

AFTER STUDYING THE BRIEF
THOUGHT ACCORDING TO THE LAW:

The petitioner (husband) in his petition of March 8th 1996 pleads an urgent condition and requests as a security measure the adjustment of the use of the family residence of the parties, who are spouses, by changing the residence of the defendant (wife), after she takes the movable goods that are necessary for her separate maintenance. The petition is legal. It is based on the articles 1386, 1393, 1394 Civil Code, 731, 735 Civil Affairs, Legal Proceedings Code (C.A.L.P.C.), it is to be judged in the course of consideration of the security measures (articles 686 fol. C.A.L.P.C.) and must be considered on its merits.

The petitioner (wife) with her petition of May 2nd 1996 pleads an urgent condition and impeding danger and requests as security measures that the care of the minor daughter of the parties be assigned to her temporarily, due to a change of conditions subsequent to the issuance of decision No 11213/1996 of the Single-Member Lower Court of Athens (Security Measures), which ordered that the care of the minor be shared by both parties and rejected the petition in opposition in that case; and b) that the defendant (husband) be obliged to pay to her temporarily 50.000 drachmas per month

alimony, since she refrains from matrimonial cohabitation for reasonable reasons. This petition is also legal, since it is based on articles 1391, 1392, 1493, 1496, 1498, 1510, 1511, 1512, 1513, 1518 Civil Code, 728, 729, 735 C.A.L.P.C., it is brought on for consideration through the same procedure, and also must be considered on its merits as well, after having been weighted together with the preceding petition due to its relevance thereto.

The petitioner-defendant (husband) claims that the petition of the defendant-petitioner (wife), is in conflict with the temporary order resulting from the decision of the Single-Member Lower Court of Athens referred to above; if its is intended to alter and revoke the earlier judgment, this court is incompetent, since according to article 696 & 3 the Single-Judge Court of First Instance of Athens that issued this judgment is competent to do so. These appeals, though not based on statute, on the one hand, because of the temporary effect of the judgment on security measures, binds the Court and the parties until the conjecture of existence of new elements or subsequent is shown.

According to article 696 & 3 C.A.L.P.C. the judgment that ordered security measures but not the one that declined the initial petition, is subject to revocation; therefore a change of condition justifies the submission of a new petition for security measures (Tzifras: Security measures ed. 1980 pp. 68 and 90 fol., Beis: Civil Procedure in articles 695 and 696 vol. 00. 180 and 193).

From the testimony of the witness that were examined in open court, the documents that the parties introduce and invoke their claims and the hearing of the case, the following

were conjectured: The parties legally performed a civil marriage in Glyfada on September 9th 1989 from which they had a daughter Bronte-Juduth-Despina, born on October 2nd 1991. Their matrimonial cohabitation though was not harmonious due to both parties. More specifically the petitioner-defendant (husband) being of a cyclothymic, inconsistent, authoritarian and violent character, and influenced to a large extent by his mother, behaved authoritatively, inconsistently and contemptuously toward the defendant-petitioner (wife), deprived her of every initiative and was hitting her with his fists and his guns (he is commander of the Navy) causing her bodily injuries, as well as hitting their minor daughter. But the defendant-petitioner (wife) was also attempting to detach him from his parental family, with purpose to convince him to resign from his service, leave Greece and settle with her in the U.S.A., her country of origin; and in January 1990 she deserted the petitioner-defendant (husband) and returned to the U.S.A. for permanent residence, but returned to Greece, after the petitioner-defendant (husband), having gone to America for this reason, dissuaded her. Due to the fact though that the same problem continued between the parties, the defendant-petitioner (wife) left the conjugal residence again and attempted to depart along with their minor daughter to the U.S.A., which did not happen since the petitioner-defendant (husband) submitted to the Single-Member Lower Court of Athens his petition of February 27th 1996, by which he was requested that the care of the minor be given to him temporarily, but the same request was also submitted by the defendant-petitioner (wife) with a counter-petition of her own during the hearing of the above petition. The Single Member Lower Court of Athens by its judgment No. 11213/96 accepted the petition and declined the counter-petition, and

took as a sole security measure the prohibition of exit from Greece of the minor until her care was regulated which care it left to both parties together, as it is concluded from its grounds with a final court judgment, and after this the defendant-petitioner (wife) filed her relevant principal legal action of May 2nd 96. However, after the issuance of the above judgment, and while the first of the petitions to be judged was pending, the defendant-petitioner (wife), due to the problems referred to above between them, departed on May 2nd 96 from the conjugal residence, which is the property of the Navy and has been allotted by it to the petitioner-defendant (husband) as a family residence, and went to the residence of her father and witness George William Kostun, along with the minor daughter of the parties, but the petitioner-defendant (husband) went there later, took the minor and left, preventing the defendant-petitioner (wife) from continuing to care for her or to communicate with her since then.

In view of all these the Court judges that the care of the minor must temporarily be assigned to her mother, defendant-petitioner (wife) as required by her true interest since due to her infantile age she is in need of the presence and care of her mother, given that the allegations of the petitioner-defendant (husband) against her were not conjectured he himself cannot take care of her due to his work, and the minor which lives with him and his mother (her grand-mother) manifests confusion and aggressive and ill-mannered behavior (see testimony of the above witness). Besides those, the defendant-petitioner (wife) cannot any more after the above decision of the Single-Member Lower Court of Athens depart along with the minor from Greece, and has rented a residence in Chania and sought employment with the

American Navy Force (naval bases of Souda), in order that the petitioner-defendant (husband) is not deprived of his communication (visitations) with the minor. It was also conjectured that the defendant-petitioner (wife) refrains for reasonable causes in view of the above-referenced behavior of the petitioner-defendant (husband), from matrimonial cohabitation and is therefore entitled to alimony, which according to her needs, amounts to 50.000 drachmas per month, an amount that the petitioner-defendant (husband) is in a position to pay without risking his own maintenance, given that his usual monthly salary from his above service, according to the rules of common sense and common experience exceeds the amount of 200.000 drachmas.

Therefore, both petitions should be accepted as substantially well-founded as well as defined in the pronouncement and each party must pay its own judicial expenses due to their quality of being spouses (article 179 C. Civil P.).

FOR THESE REASONS.

Determining in the presence of both parties,

Judges the petitions of March 8th 96 and May 2nd 96 together;

Accepts them for adjudication;

Adjusts the use of the family residence of the parties and orders the departure of the defendant-petitioner (wife) from it, after she tales the movable goods that are necessary for her separate maintenance;

Assigns temporarily to the defendant-petitioner (wife) the care of the minor daughter of the parties, Bronte-Judith-Despina, until issuance of the final judgment on her main relevant legal action of May 2nd 96;

Compels the petitioner-defendant (husband) to pay temporarily to the defendant-petitioner (wife) as her alimony the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month;

Orders each party to pay its own judicial expenses.

Judged, decided and published on a special public hearing of this Court, on June 24th 1996 in Chania, the parties and their attorneys at law being absent.

THE JUDGE
(signed)

THE CHIEF-CLERK
(signed)

TRUE COPY
Chania, June 28th 1996
The Secretary

ARTEMIS KARTAKI
(singed)

AUTHENTICATED
For legal stamping and issuance
according to order of request

Chania, June 28th 1996
The Secretary
(signed) ARTEMIS KARTAKI

Emmanuel Tzanakakis, son of Konstantinos commander of the Navy, resident of Souda Crete, a settlement of the Navy-yard in Crete, has been legally served with notice that he is ordered: a) to deliver the minor child Bronte-Judith-Despina to her mother Gia, wife of Emmanuel Tzanakakis, nee KOSTUN, who has temporary care of the

minor, daughter of both parties, until issuance of the final judgment on her relevant main legal action of May 2nd 96 and b) to pay temporarily to Gia, wife of Emmanuel Tzanakakis, nee KOSTUN an alimony in the amount of fifty thousand (50,000) drachmas per month, within the first five days of every month, starting on July 1st, 1996.

In case of non-compliance the present will be executed in mandatory manner, the costs of execution being charged to the defendant (husband).

Chania, June 28th 1996
The attorney at law
(signed)
ELENI KOKKINAKI

APPENDIX B

EXPLANATION OF GREEK LEGAL PROCEEDINGS BY A. ELEFTHERIADOU, CENTRAL AUTHORITY FOR HELLENIC REPUBLIC

HELLENIC REPUBLIC
MINISTRY OF JUSTICE
DIRECTION A
SECTION 4

24 December 1997

To Mr. Stephen
McMurtry
attorney at law
USA

Subject : JANAKAKIS case.

Dear Mr. Mc Murtry

Referring to the above case and after the questions you submitted we inform you the following about the procedure of security measures concerning to the applicable articles of the Civil affairs Legal proceedings code and about the case in subject specifically.

GENERAL INFORMATION

1) Security measures are ordered by the court in urgent situations (because it is short procedure) (article 682).

2) *In cases of security* measures pre-evidence is obligatory and conjecture (guess) of the claims is enough (it is not necessarily to have an evidence of the facts). Keeping of records is not obligatory and it is up to the judge to have records kept or not (article 690).

3) The decision of security measures is temporary and does not affect the main case (article 695).

4) The decision which ordered a security measure can be retracted fully or partially if :

a) a definite decision of the trial for the main case against the person who had requested the security measure is issued and this decision becomes final (decision of the court of appeals).

b) a definite decision which benefits him is issued and it is executed.

c) a compromise is agreed on the main case.

5) Decision accepting or rejecting applications for security measures can not be offended by any legal mean unless otherwise defined (the decision can not be appealed).

INFORMATION OF JANAKAKIS CASE

In application of the above in Janakakis case we inform you the following:

Explanation of Greek Legal Proceedings

1) The term main case mentioned above is the regulation of the final custody-care of the daughter of Emmanuel and Gia Janakakis.

2) By the decision 11213/1996 the lower court of Athens according to security measures procedure decided a security measure prohibiting the exit of the child from Greece until a final decision is made on the main case (custody of the child).

3) By the decision 531-1996 the Lower Court of Chania – according to security measures procedure – assigned temporarily the care of the child to Gia Janakakis. This decision does not retract the security measures ordered by the decision 11231/96 of the Lower Court of Athens which is the prohibition of the exit of the child from Greece because it is not a final decision on the main case. This is mentioned clearly in the decision 531/1996. As mentioned in par. 2 of General information this decision is not necessarily based on evidence but conjectures are enough. This is why the term conjecture is repeatedly mentioned in all security measures decisions.

4) By the decision 617/1996 the Lower Court of Chania – under the procedure of security measures – defined the temporary regulation of communication (visitation) of Emmanuel Janakakis with his daughter. It is mentioned that the mother consented to the greatest part of the requested communication (visitation).

5) All the above decision are considered security measures and are temporary and do not affect the main case (final custody) as mentioned in par. 3 of the above general information.

6) For resolution of the main case the following main legal actions were filed in the Lower Court of Chania.

a) Gia Janakakis.

Legal action protocol No 376/12-6-96 requesting exclusive custody otherwise care of her daughter and allowance to move to TEXAS, U.S. or. stay in CRETE, GREECE.

This was scheduled for the September 5 of 1996 and after postponement for the January 16 of 1997.

b) Emmanuel Janakakis.

Legal action protocol No 498/29-7-96 requesting exclusive care of his daughter scheduled for the January 16 of 1997.

The Lower Court of Chania by its decision 80/1997 after a trial on January 16 of 1997 on the above legal action of Em. Janakakis assigned exclusively the exertion of the care of the child to Em. Janakakis.

arti/ps (SEAL) The Head of Section
A. ELEFTHERIADOU

APPENDIX C

THE LOWER COURT OF ATHENS
SECURITY MEASURE SECTION

DECISION NUMBER 11.213/1996

THE SINGLE MEMBER LOWER COURT OF ATHENS

Consisted of Judge Erotokritos Kaloudis president of the Lower Court Judges appointed by the President of the three - member Council of the Lower Court Administration.

Held a public session to its audience on the 28-3-1996 (28 March 1996) without the collaboration of a secretary to judge the case between

The applicant Emmanuel Janakakis of Konstantine, resident of the Naval Station Crete Housing, who appeared with his attorney Visilios Panagiotopoulos.

The defendant - counter applicant Gia wife of Emmanuel Janakakis, Kostun resident of Souda Crete, Naval Station Crete Housing and already temporarily residing inn Athens at **ATHINAIS HOTEL** who appeared with her attorney Kyriakos Kokkinos.

The applicant asks for the acceptance of his application from 27-2-1996 (27 Febr 1996) (Introduction Statement Number 2751/96) which was designated for the 6-3-96 (6 March 96), and was postponed for the above trial date and was registered in the statement.

During the discussion of the application and counter – application which are judged together because of relevance the attorneys of the litigants promoted their allegations and asked, that they become accepted.

AFTER STUDYING THE BRIEF
THOUGHT ACCORDING TO THE LAW

The applicant, with his application from 27-2-1996 (27 Feb 1996) introduction statement Number 2751/1996 calls upon an urgent circumstance and asks as a security measure the temporary assignment to him of the care of his not adult child, which he attained with the defendant, his wife, from who he is separated since she abandoned the family residence in Chania taking their child with her and came to Athens, where she is temporarily residing, with the intention to fly to the U.S.A., and settle there permanently. The application is responsibly introduced to be discussed in this court during the Procedure of Security Measures (Articles 682, 683, para. 3 and 686 of the Civil Affairs Legal Proceedings Code).

It is based on the regulations of the articles 1510, 1511, 1512, 1513, 1514, 1518, of the Civil Code and 735 of the Civil Affairs Legal Proceedings Code. Consequently it must be discussed further down essentially.

The defendant with a counter – application which she introduced verbally during the discussion, also calls upon an urgent circumstance and asks, as a security measure the temporary assignment to her of the care of her not adult child. The counter – application was introduced acceptably according to the Civil affairs Legal Proceedings Code and must be judged together with the application because of

obvious relevance and must also be examined further down essentially.

From the sworn testimony of the witness Maria Karyda and the, without oath examination of the defendant counter - applicant with the assistance of Nikolaos Stamatopoulos who was assigned by the Court as an interpreter (Civil Affairs Legal Proceedings Code Article 415) and from the documents the litigants present the following were supposed: